Supreme Court, U.S.
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No. 96-1299

In The

Supreme Court of the United States

October Term, 1996

CYNTHIA A. METZLER, ACTING SECRETARY OF LABOR,

Petitioner,

vs.

S.A. HEALY COMPANY, an Ohio corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Question Presented in the Petition is inaccurate or incomplete. The specific question presented is whether the petitioner is barred by the double jeopardy clause of the Fifth Amendment from assessing civil penalties against respondent under its "instance-by-instance" penalty policy when respondent has previously been convicted and fined in a criminal proceeding for the same offense. Instance-by-instance penalties are imposed by the petitioner only for willful and flagrant OSHA violations and are intended to be punitive.

LIST OF INTERESTED PARTIES

Petitioner, respondent below, is the Secretary of Labor, United States Department of Labor. The Occupational Safety and Health Review Commission was also named as a respondent below.

Respondent, petitioner below, is S.A. Healy Company, an Ohio Corporation, and a sub-sub-subsidiary of Impregilo SpA Milano, a publicly traded company in Italy. S.A. Healy Services Inc., an Illinois corporation, is a wholly owned subsidiary of S.A. Healy Company.

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Respondent S.A. Healy Company (Healy) submits this Brief in Opposition to the Petition for Writ of Certiorari of the Secretary of Labor (Secretary). The Secretary's request that her petition for a writ of certiorari be held pending the Court's consideration and disposition of the petition in *Hudson v. United States*, No. 96-976, should not be granted. The present petition raises no question meriting review and should be denied.

STATEMENT OF THE CASE

Healy is a company engaged in tunnel and other public works contracts (App. 67a). ("App." refers to the Appendix to the Petition for a Writ of Certiorari). In March 1987, the Milwaukee Metropolitan Sewerage District entered into a contract with Healy to construct the Crosstown Seven North Tunnel as part of the Water Pollution Abatement Program in Milwaukee, Wisconsin (*Id.*).

A. OSHA Civil Complaint Against Healy

On November 10, 1988, a methane gas explosion occurred in the tunnel resulting in the death of three Healy employees (App. 1a, 67a-68a). The Occupational Safety and Health Administration (OSHA) conducted an investigation of the explosion and on May 1, 1989, the Secretary issued a citation and notification of penalty citing Healy for 68 willful violations of OSHA standards (App. 1a, 68a). The Secretary issued the citation under the so-called "egregious" or "instance-by-instance" policy and proposed a then maximum penalty of $10,000 for each instance for a total penalty of $680,000 (App. 2a, 14a). The "egregious" or "instance-by-instance" policy defines each individual instance of noncompliance with a specific standard as a separate and distinct violation with its own penalty (App. 2a, 29a, 77a). For example, the citation alleged 5 instances (items 1 through 5) of violation of 29 C.F.R.

§ 1926.21(b)(2), (b)(6)(i) (failure to instruct each employee in the recognition and avoidance of unsafe conditions); 45 instances (items 6 through 50) of violation of 29 C.F.R. § 1926.407(b) (electrical installations in a hazardous location); and 14 instances (items 54 through 67) of violation of 29 C.F.R. § 1926.800(c)(2)(vi) (electrical power shut-off) (App. 66a-67a). Instance-by-instance penalties are not provided for in the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* (the Act) but are imposed under an administrative policy adopted by the Secretary for willful and flagrant violations that produce severe injuries (App. 11a, 31a). When the Secretary issues a citation under her usual, not instance-by-instance, policy, all allegations of violation of one particular section or subsection of a standard are combined within a single item and penalty (App. 29a, 30a, 77a).

Healy contested the citation and on October 17, 1990, the Secretary filed a complaint with the Occupational Safety and Health Review Commission (Commission) seeking an order affirming the citation and penalty (App. 14a, 68a-69a). Thereafter the civil proceeding was stayed until the criminal action described below was concluded (App. 68a n.1).

B. OSHA Criminal Prosecution of Healy

After the willful citation issued, the Secretary referred her investigative findings to the United States Attorney for the Southern District of Wisconsin for possible criminal prosecution under 29 U.S.C. § 666(e) which provides for criminal prosecution of an employer for a willful violation of the Act causing death to an employee (App. 2a, 68a). Healy was indicted by a grand jury on three counts, one for each death (App. 2a, 14a-15a, 68a). On February 20, 1991, a jury found Healy guilty on all three counts for violating three OSHA standards (*Id.*). The Secretary sought a criminal fine of $400,000 on each count

(rather than the maximum of $500,000), but the district court sentenced Healy to a fine of $250,000 on each count, for a total fine of $750,000 (App. 1a, 15a, 68a).[1] Judge Terence Evans ruled:

> The fine accordingly is $750,000 to include all court costs. In other words, nothing additional. That includes the costs.

(R. Vol. 3, No. 38A, Exh. A, at 22). Healy did not appeal from the jury verdict and fine (App. 2a, 68a).

C. OSHA's Continued Civil Proceedings

The three standards which the jury found Healy violated included 49 of the 68 instances cited in the Secretary's civil citation and complaint (App. 2a, 15a, 68a). On April 18, 1990, the Secretary filed a motion for partial summary judgment on the civil complaint claiming that Healy was collaterally estopped from relitigating 49 of the alleged violations because the facts and legal issues as to those violations had been determined by the judgment in the criminal case (App. 2a-3a, 68a-69a). Healy did not dispute the applicability of collateral estoppel to the 49 instances of violations, but averred that the civil penalty sought by the Secretary constituted a second punishment for the same offense and was barred by the double jeopardy clause of the Fifth Amendment under *United States v. Halper*, 490 U.S. 435 (1989) (App. 3a, 69a-70a). The parties agreed that the criminal

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1. At the sentencing hearing in an attempt to mitigate the fine Healy raised several factors, such as the potential for OSHA civil penalties, civil lawsuits arising from the fatalities, and lost contracts as a result of the criminal proceedings (App. 16a-17a). Judge Evans considered these factors and found that Healy had cooperated during the investigation and had shown remorse over the fatalities in arriving at an appropriate criminal fine (*Id.*).

convictions covered the same conduct at issue in 49 of the violations alleged in the complaint. (App. 15a, 71a-72a).[2]

The administrative law judge (ALJ) granted the motion and held that collateral estoppel applied to the 49 violations but reserved ruling on the double jeopardy defense and amount of penalties to be assessed pending a hearing as to the government's costs occasioned by Healy's violations (App. 71a-72a). At an evidentiary hearing the Secretary submitted affidavits showing that the cost to date for the government's investigation and prosecution of Healy was $795,380.31 (App. 73a-74a, 98a-99a). Relying on the factors enumerated in 29 U.S.C. § 666(j), the ALJ found that a penalty of $6,500 was appropriate for each of the 49 violations, rather than $10,000 as the Secretary proposed. He imposed a total penalty of $318,500 (App. 3a, 16a, 85a)[3] and denied Healy's double jeopardy defense holding that the $318,500 civil penalty was rationally related to the government's costs and thus was not a second punishment under the *Halper* proportionality test (App. 3a, 15a-16a, 93a-101a).

Healy filed a petition for review with the Commission. The Commission affirmed the ALJ's ruling on the double jeopardy defense (App. 3a-4a, 13a-52a), acknowledging that the purpose of the instance-by-instance penalty mechanism is to deter the offending employer and employers in general and has punitive potential or punitive effect (App. 31a-34a). The Commission, however, held that the instance-by-instance penalty was less than the government's costs in investigating and prosecuting Healy

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2. The parties agreed to settle the remaining 19 violations alleged in the complaint which had no relation to the jury verdict (App. 15a) and are not involved in this appeal.

3. The order entered a total penalty of $375,000, which included $56,500 in agreed penalties for the 19 cited instances that the parties had settled (App. 101a-105a). *See* n. 2, *supra*.

and thus was not punitive and a second punishment under the *Halper* proportionality test (App. 49a-50a).[4]

D. Healy's Appeal to the Seventh Circuit

Healy appealed the Commission's decision on the double jeopardy issue to the Court of Appeals for the Seventh Circuit. On September 18, 1996, in an unanimous decision the court set aside the Commission's order holding that "Healy has been through two proceedings, each imposing punishment, and thus two jeopardies" (App. 12a). Judge Easterbrook, relying on the Court's recent decision in *United States v. Ursery*, __ U.S. __, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), held that fines under the Act are *in personam* civil penalties and, unlike *in rem* civil forfeiture, could be potentially punitive and constitute a punishment under the double jeopardy clause (App. 5a-6a). He also observed that, unlike the False Claims Act construed in *Halper*, nothing in section 666(j) of the Act allows for consideration of the loss suffered by the government or the costs of investigation and prosecution (*Id.* at 6a-7a). He noted too that where the United States is the victim (as well as the prosecutor) as under the False Claims Act, a judgment under such legislation could be remedial and rationally related to making the government whole (*Id.* at 7a-8a). In the present case, the United States was not a victim of the explosion and none of the fine imposed under the OSHA Act can be justified as remedial and as related to making the government whole (*Id.*). In *Halper* the fine served at least in part as a remedy whereas here the monetary fine is destined for the Treasury which was

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4. The Commission, however, remanded the case because in his assessment the ALJ had not properly evaluated the gravity of each instance of violation (App. 50a-51a). Rather than incur the time and expense of a further hearing on a narrow issue, the parties, at the Secretary's suggestion, stipulated that "for purposes of appeal" the appropriate total penalty shall be $5,100 per violation for a total of $249,900 (App. 4a).

not injured by the explosion and serves a deterrence function (*Id.* at 8a).

Judge Easterbrook further observed that if, as the Secretary urged, we were to treat deterrence (and the costs of achieving it) as "remedial" then the entire criminal apparatus could be remedial and there is not much left of the double jeopardy clause (*Id.*). The Seventh Circuit rejected the Secretary's argument that the Act, as a "remedial" statute designed to promote safety, falls outside *Halper* because any fine likewise is remedial and must be treated as non-punitive: "The issue under *Halper* is not whether the statute is designed to serve a remedial or otherwise beneficial purpose, but whether it achieves this end by the imposition of punitive sanctions" (*Id.* at 10a).

Here, as Judge Easterbrook noted, Healy was penalized under the "instance-by-instance" policy, which the Secretary reserves for willful and flagrant violations that produce severe injuries and, in the Secretary's own words, is imposed "to provide a deterrent effect on employers in general" (*Id.* at 11a-12a). He concluded that a penalty designed to deter wrongdoing is punishment and that the punitive potential of the instance-by-instance penalty had been realized here:

> Healy was fined 43 times for failure to use approved electrical equipment. This included 13 exactions for light fixtures, all identical except for location.

(*Id.* at 12a).

REASONS FOR DENYING THE WRIT

I.

THE COURT BELOW CORRECTLY DECIDED THE ISSUES CONSISTENT WITH THE COURT'S PRIOR DECISIONS.

The Seventh Circuit decided *Healy* correctly in harmony with this Court's decisions. It applied the holdings and rule of law stated in *Halper* and *Ursery* to the facts here to conclude that the clearly punitive civil penalty imposed under the Secretary's rarely used instance-by-instance policy, which cannot be remedial, was barred as a second punishment by the double jeopardy clause. This was consistent with OSHA's directives and instructions which acknowledge the "punishment" and "deterrent" functions of the instance-by-instance policy in egregious cases. *See* App. 32a-34a; OSHA Instruction CPL 2.103, ch. IV, section C.1.a (Sept. 26, 1994), reprinted in 4 Employ. S. & H. Guide (CCH) ¶7966.150.

II.

THE TENTH CIRCUIT'S *HUDSON* DECISION IS DISTINGUISHABLE ON ITS FACTS AND IS NOT IN CONFLICT.

The Secretary claims that the petition should be granted because

> This case presents the same issue as *Hudson v. United States*, No. 96-976: whether civil penalties imposed as part of the regulatory dual-enforcement schemes trigger double jeopardy scrutiny, especially when, as alleged here and in *Hudson*, those penalties bear a reasonable relationship to the costs of investigating and prosecuting defendant's wrongdoing.

(Pet. 7). There is no basis for granting the petition under Rule 10(a) of the Supreme Court Rules as the Secretary suggests. An analysis shows that the *Healy* decision is not truly in conflict with *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *petition for cert. pending*, No. 96-976. In *Hudson* defendants were fined a total of $44,000 in a civil proceeding brought by the Office of the Comptroller of the Currency (OCC) for violations of statutes governing national banks and the Federal Reserve System, which caused approximately $900,000 in losses to the Federal Deposit Insurance Corporation (FDIC). 92 F.3d at 1027-28, 1029. The OCC had incurred costs of $72,000 in pursuing the defendants (*Id.* at 1028). The Tenth Circuit, reversing the district court, held that subsequent criminal indictments for the same transactions did not violate the multiple punishments forbidden by the double jeopardy clause. It framed the issue on appeal as follows: "The only issue we need to address on this appeal is whether the district court erred in determining that the monetary sanctions were not solely remedial" (*Id*). Applying *Halper* to the facts, the Tenth Circuit concluded that the district court had erred because the monetary sanctions of $44,000 were rationally related to the government's damages (*Id.* at 1030). In *Hudson*, akin to *Halper*, an agency of the United States, the FDIC, was the ultimate victim of the defendants' banking law violations and hence the civil penalty there, as in *Halper*, could serve in part the remedial purpose of making the United States whole. In *Healy*, the government was not the injured party, and therefore, the civil fine imposed on Healy, to be paid to the United States Treasury, could not produce a benefit to those injured and could not be remedial (App. 8a).

Moreover, unlike the instance-by-instance penalty imposed in *Healy*, *Hudson* did not involve imposition of a clearly punitive civil penalty. Had the Tenth Circuit been confronted by such a punitive penalty, it may have reached the contrary conclusion that "the monetary sanctions were not solely remedial."

Therefore, *Hudson* and *Healy* are consistent with the holding in *Halper* even though reaching opposite results.

It is true the Seventh Circuit also stated:

> We respectfully decline to follow *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *to the extent it holds* that a fine that does not exceed the costs of investigation and prosecution cannot be "punishment".

(App. 10a) (Emphasis added) and observed in a related footnote that "[b]ecause this opinion creates a conflict among the circuits, it was circulated before release to all judges in active service" pursuant to Circuit Rule 40(e)[5] and that a majority did not favor a rehearing en banc (App. 10a n.). In fact there is no actual conflict. *Healy* did not turn upon the fact that the civil fine imposed by the Secretary was less than the government's costs of investigation and prosecution. And neither did *Hudson* which holds only that under its facts the monetary sanctions were rationally related to the government's damages. 92 F.3d at 1030. The Seventh Circuit no doubt realized that the two cases can be reconciled on this basis when it stated that it was declining to

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5. Seventh Circuit Rule 40(e), entitled "Rehearing *Sua Sponte* Before Decision," provides, in pertinent part:

> A proposed opinion approved by a panel of this court adopting a position which would . . . create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear *en banc* the issue of whether the position should be adopted. . . . [A]fter compliance with this procedure, the opinion, when published, shall contain a footnote worded . . . [to that effect].

follow *Hudson* "to the extent" *Hudson* disagreed with it. Certiorari is not customarily granted on the basis of such a hypothetical conflict.

Likewise there is no conflict with the Sixth Circuit's opinion in *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993), holding that civil penalties under the Mine Safety and Health Act reasonably related to the governments costs of investigation and prosecution are not punitive (Pet. 7). As Judge Easterbrook pointed out, *WRW Corp.* relied upon the test in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) and "treated *Halper* as an insignificant blip" (App. 9a). In the Seventh Circuit's view, "*Ursery* shows that *Halper* displaced older approaches and is now the point of reference for the inferior courts" (*Id.*).

III.

THE PETITION SHOULD NOT BE HELD PENDING DISPOSITION OF THE PETITION IN *HUDSON*.

Inasmuch as *Healy* was correctly decided and is factually distinguishable from *Hudson*, the government's request to defer ruling pending the court's disposition of *Hudson* should be denied.

CONCLUSION

The petition for writ of certiorari establishes no ground meriting further review by the Court. The court below correctly apprehended and applied the controlling legal standard set forth in *Halper* to the unique circumstances in this record which are factually distinguishable from *Hudson*. The petition should be denied forthwith and not held pending the disposition of the petition in *Hudson*.

Respectfully submitted,

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